

are actually directed to. The present claims, as exemplified by the broadest claim, claim 1, is directed, in the express language of the claims to a cosmetic or pharmaceutical composition comprising a non-rigid, porous support in which a low-viscosity, gellant-containing, otherwise unstable cosmetic or pharmaceutical formulation is incorporated. However, the Examiner has chosen to invent a different version of the claims to suit a poorly founded rejection; the present claims are not directed, as the Examiner has stated, to a water-in-oil formulation, that contains an oil phase, a gellant, a pigment, and substantially no waxes or suspending agents. Therefore, the sole supporting basis for the Examiner's maintaining the rejection, i.e., that the Igo-Kemenes reference "teaches the composition as claimed", is, quite simply, untrue. No reading of the language of the present claims will turn them into the Examiner's imagined version of the claims.

As Applicants have clearly stated previously, a critical aspect of the invention is that the formulation, in the absence of the porous support, is unstable, i.e., it is incapable of supporting the weight of pigment on its own. This suggestion is not to be found anywhere in either the Igo-Kemenes reference or the Iosilevich reference. The Examiner has taken the position, in the office action, that the Igo-Kemenes formulation can be unstable, for the aforesaid reason, i.e. that it teaches the composition "as claimed". As has already been shown, this statement in itself is readily revealed as false and insupportable by a simple reading of claim 1 of the present application. However, it is also completely in contradiction to the express words of the Igo-Kemenes reference. As Applicants have pointed out in the last response, Igo-Kemenes expressly states that the gellant in the disclosed formulation is employed for the express purpose of "improving emulsion stability" (emphasis added; column 6, line 14). This is reiterated at column 14, lines 51-52, wherein the compositions disclosed are said to exhibit "improved...product stability". In the light of the express teaching of Igo-Kemenes that the formulations taught therein are stable, how can the Examiner then seriously take the position that the formulations are unstable? The answer to this question is clearly that the position is untenable. The fact that certain components are common to the formulations of Igo-Kemenes, and certain of the formulations of the present invention, does not make the compositions the same, and as shown above, the present invention, as claimed, unequivocally is not the same composition as those described in Igo-Kemenes. Indeed, the Igo-Kemenes reference teaches directly away from the creation of an unstable formulation, and this teaching away is a compelling basis for a finding of nonobviousness. *In re Hedges*, 228 USPQ 685, (Fed. Cir. 1986). If the Examiner can show, with any supporting evidence, that the Igo-Kemenes reference teaches unstable formulations, a position that is in direct contradiction to the teachings of the cited reference, then Applicants respectfully request that this be documented, in place of the present unsupportable, merely conclusory statements having no evidentiary basis whatsoever. It is well


established that the PTO must provide objective evidence in support of a rejection, and failing that, the PTO cannot sustain its burden in establishing a *prima facie* case of obviousness. *In re Fine*, 5 USPQ 2d 1596 (Fed. Cir. 1988); see also *In re Lee*, Fed. Cir. 00-1158, 1/18/02. Since the rejection is completely devoid of the necessary objective evidence, the obviousness rejection of claims 1-26 must be withdrawn on this basis alone.

If one turns to the Iosilevich reference, there is no remedy to be found here for the defect in the Igo-Kemenes reference. There is no disclosure of an unstable formulation to be found in Iosilevich. Thus, even if one were to directly combine Igo-Kemenes with Iosilevich, one would still not arrive at the composition of the present invention, which requires the presence of an unstable formulation. Since none of prior art cited mentions the desirability of an unstable formulation for any use, and the one teaching that expressly addresses stability teaches against the use of an unstable formulation, a crucial aspect of the invention is entirely missing from the references relied upon. It is axiomatic that establishment of a *prima facie* case of obviousness requires, *inter alia*, that prior art reference(s) teach or suggest all claim limitations. *In re Royka*, 180 USPQ 580 (CCPA 1974). Since the rejection fails to provide a teaching in the cited prior art relating to the use of an unstable formulation, the rejection cannot stand and must be withdrawn.

#### CONCLUSION

The present claims are believed to be in condition for allowance, and prompt issuance of a Notice of Allowance is respectfully solicited. The Examiner is encouraged to contact the undersigned by telephone if it is believed that discussion will resolve any outstanding issues.

Respectfully submitted,



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